United States Department of Labor
Employees' Compensation Appeals Board

M.G., Appellant	)	
and	)	**Docket No. 16-0438**
	)	**Issued: March 23, 2017**
U.S. POSTAL SERVICE, VEHICLE MAINTENANCE FACILITY, Shaker Heights, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 8, 2016 appellant, through counsel, filed a timely appeal from a December 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that he has ratable permanent impairment of the right upper extremity and more than one percent impairment of the left upper extremity.

FACTUAL HISTORY

Appellant, a 44-year-old automotive technician, filed a traumatic injury claim (Form CA-1), alleging that he sustained multiple injuries to his upper extremities in the performance of duty. OWCP initially accepted bilateral shoulder bursitis under File No. xxxxxx566, with an August 1, 2004 date of injury. On January 4, 2008 appellant underwent OWCP-approved left shoulder diagnostic arthroscopy. On March 20, 2008 he sustained another work-related injury, which OWCP accepted for left shoulder sprain under File No. xxxxxx455.[3] On May 30, 2008 appellant underwent right shoulder diagnostic arthroscopy, which OWCP authorized under File No. xxxxxx566. She sustained another traumatic injury on December 10, 2008, which OWCP accepted for left trapezius strain and thoracic sprain under File No. xxxxxx423.[4] OWCP ultimately combined the three above-noted claims and designated File No. xxxxxx566 as the master file.

On July 7, 2009 appellant filed a claim for a schedule award (Form CA-7). By decision dated February 1, 2011, OWCP denied the claim (File No. xxxxxx455) on the basis that appellant's physician had not responded to its request for an impairment rating.[5]

On February 6, 2012 appellant filed another claim (Form CA-7) for a schedule award. In response, OWCP requested an impairment rating from appellant's then physician.

By decision dated August 16, 2012, OWCP noted that it had not received an impairment rating from appellant's physician, and therefore, it denied appellant's claim for a schedule award.

Counsel requested a hearing, which was held before an OWCP hearing representative on December 13, 2012. Following the hearing, he submitted a December 28, 2012 impairment rating from Dr. John L. Dunne, a specialist in occupational medicine. Dr. Dunne found 15 percent permanent impairment of the right upper extremity and 13 percent permanent impairment of the

[3] Appellant experienced left shoulder pain after replacing a vehicle alternator on March 20, 2008.

[4] Appellant initially filed a recurrence claim (Form CA-2a) under File No. xxxxxx455; however, based on his description of work-related events occurring on December 10, 2008, OWCP treated the claim as a new traumatic injury.

[5] OWCP failed to acknowledge that in March 2010 it had referred appellant for a second opinion examination under File No. xxxxxx566. In a March 24, 2010 report, Dr. Michael J. Jurenovich, a Board-certified orthopedic surgeon, found two percent bilateral upper extremity impairment under Table 15-5, Shoulder Regional Grid, American Medical Association, *Guides to the Evaluation of Permanent Impairment* 402 (6th ed. 2009) (hereinafter A.M.A., *Guides*). On May 31, 2010 the district medical adviser (DMA) reviewed Dr. Jurenovich's findings and disagreed with his impairment rating, finding instead that appellant had zero percent bilateral upper extremity impairment under the A.M.A., *Guides* (6th ed. 2009).

left upper extremity due to range of motion (ROM) deficits in both shoulders, citing Table 15-34, A.M.A., *Guides* 475 (6th ed. 2009).[6]

By decision dated March 7, 2013, the hearing representative set aside OWCP's August 16, 2012 decision. He remanded the case in order for the DMA to review Dr. Dunne's recent bilateral upper extremity impairment rating.

In an April 30, 2013 report, Dr. Morley Slutsky, the DMA Board-certified in occupational and preventive medicine, found that appellant had no ratable impairment in either upper extremity. He noted that he rated appellant under the "preferred" diagnosis-based impairment (DBI) methodology, rather than the ROM methodology Dr. Dunne utilized.[7] Citing Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 402 (6th ed. 2008), the DMA rated appellant based on a diagnosis of nonspecific shoulder pain, and found zero percent bilateral upper extremity impairment.[8]

In a July 3, 2013 decision, OWCP denied appellant's claim for a schedule award based on the April 30, 2013 findings of its DMA.

In reports dated July 18 and December 8, 2013, Dr. Dunne reviewed the DMA's findings and reiterated his prior bilateral upper extremity impairment rating based on shoulder ROM deficits. In his December 8, 2013 report, Dr. Dunne specifically noted that Table 15-5 allowed for alternative ratings based on loss of motion.

Appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated February 12, 2014, OWCP's hearing representative set aside the July 3, 2013 decision due to an unresolved conflict in medical opinion between Dr. Dunne and the DMA. Consequently, he remanded the case for referral to an impartial medical examiner (IME).

In a July 28, 2014 report, Dr. Manhal Ghanma, a Board-certified orthopedic surgery and IME, found that appellant had zero percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity under Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401-05 (6th ed. 2009). He explained that appellant's accepted diagnosis of bilateral shoulder bursitis did not result in impairment under Table 15-5. As to appellant's accepted left shoulder sprain, Dr. Ghanma found one percent permanent left upper extremity impairment under Table 15-5. Although he recorded bilateral shoulder ROM measurements, Dr. Ghanma did not rate appellant under Table 15-34, noting that the DBI methodology is the one that "should be chosen to determine [appellant's] impairment … for the

[6] Dr. Dunne also explained why appellant's bilateral upper extremity impairment could not properly be rated pursuant to Table 15-5, Shoulder Regional Grid, A.M.A., *Guides* 401-05 (6th ed. 2009).

[7] The DMA also questioned the validity of Dr. Dunne's shoulder ROM measurements.

[8] At page 5 of his April 30, 2013 report, Dr. Slutsky quoted language from section 15.2, page 387 regarding ROM usage. However, in the 2009 second printing of the A.M.A., *Guides* sixth edition this quoted language was redacted and replaced. The second printing instructs that ROM "*is used primarily as a physical examination adjustment factor and only to determine actual impairment values when a grid permits its use as an option.*"

allowed conditions of his claim." Instead, the IME used the left shoulder ROM deficit ("12 percent") as a physical examination grade modifier in his DBI calculation. In conclusion, the IME noted that his opinion fell closer to Dr. Slutsky's than Dr. Dunne's.[9]

OWCP referred the case to another DMA, Dr. Daniel D. Zimmerman, a Board-certified orthopedic surgery. In a November 2, 2014 report, Dr. Zimmerman found that the IME's July 28, 2014 impairment rating was acceptable under the A.M.A., *Guides* (6th ed. 2009). Consequently, he concurred with the finding of zero percent permanent impairment of the right upper extremity and one percent permanent impairment of the left upper extremity.

By decision dated February 4, 2015, OWCP granted appellant a schedule award for one percent permanent impairment of the left upper extremity. The award covered a period of 3.12 weeks from July 28 through August 18, 2014. As to the right upper extremity, OWCP found zero percent impairment.

Counsel timely requested a hearing, which was held before an OWCP hearing representative on September 16, 2015.

In a December 2, 2015 decision, the hearing representative affirmed OWCP's February 4, 2015 decision.

LEGAL PRECEDENT

Section 8149 of FECA delegates to the Secretary of Labor the authority to prescribe rules and regulations for the administration and enforcement of FECA. The Secretary of Labor has vested the authority to implement the FECA program with the Director of OWCP.[10] Section 8107 of FECA sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions, and organs of the body.[11] FECA, however, does not specify the manner by which the percentage loss of a member, function, or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. Through its implementing regulations, OWCP adopted the A.M.A., *Guides* as the appropriate standard for evaluating schedule losses.[12]

The sixth edition of the A.M.A. *Guides* was first printed in 2008. Within months of the initial printing, the A.M.A. issued a 52-page document entitled "Clarifications and Corrections, Sixth Edition, *Guides to the Evaluation of Permanent Impairment.*" The document included various changes to the original text, intended to serve as an *erratum*/supplement to the first

[9] Dr. Ghanma indicated that Dr. Dunne's evaluation was based on conditions that likely developed independent of appellant's work injuries and long after the dates of injuries assigned to the various claims.

[10] *See* 20 C.F.R. §§ 1.1-1.4.

[11] For a complete loss of use of an arm, an employee shall receive 312 weeks' compensation. 5 U.S.C. § 8107(c)(1).

[12] 20 C.F.R. § 10.404. *See also Ronald R. Kraynak*, 53 ECAB 130 (2001).

printing of the A.M.A., *Guides*. In April 2009, these changes were formally incorporated into the second printing of the sixth edition.

As of May 1, 2009, schedule awards are determined in accordance with the sixth edition of the A.M.A., *Guides* (2009).[13] The Board has approved OWCP's use of the A.M.A., *Guides* for the purpose of determining the percentage loss of use of a member of the body for schedule award purposes.[14]

ANALYSIS

The issue on appeal is whether appellant has met his burden of proof to establish that he has ratable permanent impairment of the right upper extremity and more than one percent permanent impairment of the left upper extremity. The Board finds that this case is not in posture for decision.

The Board has found that OWCP has inconsistently applied Chapter 15 of the sixth edition of the A.M.A., *Guides* when granting schedule awards for upper extremity claims. No consistent interpretation has been followed regarding the proper use of the DBI or the ROM methodology when assessing the extent of permanent impairment for schedule award purposes.[15] The purpose of the use of uniform standards is to ensure consistent results and to ensure equal justice under the law to all claimants.[16] In *T.H.*, the Board concluded that OWCP physicians are at odds over the proper methodology for rating upper extremity impairment, having observed attending physicians, evaluating physicians, second opinion physicians, impartial medical examiners, and district medical advisers use both DBI and ROM methodologies interchangeably without any consistent basis. Furthermore, the Board has observed that physicians interchangeably cite to language in the first printing or the second printing when justifying use of either ROM or DBI methodology. Because OWCP's own physicians are inconsistent in the application of the A.M.A., *Guides*, the Board finds that OWCP can no longer ensure consistent results and equal justice under the law for all claimants.[17]

In light of the conflicting interpretation by OWCP of the sixth edition with respect to upper extremity impairment ratings, it is incumbent upon OWCP, through its implementing regulations and/or internal procedures, to establish a consistent method for rating upper extremity impairment. In order to ensure consistent results and equal justice under the law for cases involving upper extremity impairment, the Board will set aside the December 2, 2015 decision. Following OWCP's development of a consistent method for calculating permanent

[13] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 1 (January 2010); Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013).

[14] *Isidoro Rivera*, 12 ECAB 348 (1961).

[15] *T.H.*, Docket No. 14-0943 (issued November 25, 2016).

[16] *Ausbon N. Johnson*, 50 ECAB 304, 311 (1999).

[17] *Supra* note 16.

impairment for upper extremities to be applied uniformly, and such other development as may be deemed necessary, OWCP shall issue a *de novo* decision on appellant's claim for an upper extremity schedule award.

CONCLUSION

The Board finds this case not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2015 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded for further action consistent with this decision.

Issued: March 23, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board